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Diplomatic Conference on Arrest of Ships

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PREPARATION AND ADOPTION OF A CONVENTION ON ARREST OF SHIPS

Compilation of comments and proposals by Governments and by intergovernmental and non-governmental organizations on the draft articles for a convention on arrest of ships

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INTRODUCTION

1. This document sets out the comments and proposals of the Government of the United Kingdom of Great Britain and Northern Ireland on the draft articles for a convention on arrest of ships that were received between 1 January and 15 February 1999.

COMMENTS AND PROPOSALS 1/

United Kingdom of Great Britain and Northern Ireland

Article 1 (1)

2. The current draft text for the definition of "maritime claim" in article 1 (1) provides for two alternatives, either:

(a) An exhaustive list (the current text of article 1 (1) with the square brackets, and the text between them, deleted from the chapeau); or

(b) A general description, followed by a list of examples (the current text of article 1 (1) with the square brackets deleted, but the text between them retained).

3. The decision on the definition of "maritime claim" is linked to decisions on other key issues, in particular, the circumstances in which a claimant may obtain the arrest of a ship, and what the consequences of doing so will be for the claimant. Together with other key elements, the form of definition will determine the balance that the new convention strikes between shipping interests and claimants.

4. The preference of the Government of the United Kingdom would be to have an expanded, exhaustive list for the definition of "maritime claim" (alternative (a)). However, once such a claim exists, we believe that it ought not to be unduly onerous for the claimant to obtain an arrest.

5. The negotiations within the Joint Intergovernmental Group of Experts on Liens and Mortgages and Related Subjects suggest that, while there will be support for both of the current alternatives for article 1 (1), neither might obtain sufficient support to permit its adoption according to the rules of procedure. The Conference may therefore wish to consider a compromise option.

6. The Government of Mexico has already proposed such an option (document A/CONF.188/3, para. 35). While the Government of the United Kingdom would prefer an exhaustive list, we may be able to accept such a compromise option if the Conference decides most of the other key issues in favour of claimants.

1/ Initial comments from the United Kingdom pending completion of approval procedures.

7. Should the Conference decide to consider a compromise option, it may wish to consider a simpler formulation than the one proposed by the Government of Mexico. For example the Conference could delete the square brackets and the text between them from the chapeau, and add a new subparagraph at the end of article 1 (1) as follows:

"Maritime claim" means any claim in respect of:

[(a) - (v)]; and

(w) any other claim of a similar nature to those referred to under (a) to (v) above.

8. The advantage of this approach is that it would provide an element of *ejusdem generis,* like current alternative (a). However, the flexibility provided would be more restricted than under current alternative (b).

Article 3

Introduction

9. The Government of the United Kingdom proposes an amendment to article 3 of the draft convention on the arrest of ships. Like the proposal made by the International Maritime Committee (CMI), the proposed amendment would clarify that national law would determine whether a claimant may arrest a ship other than the particular ship in respect of which the maritime claim arises. It goes further than the CMI proposal, however, by providing explicitly for the arrest of "associated" ships (associated ships are ships that are in common control). We also discuss the definition of control, and whether the convention ought to contain any guidance.

Background

10. The 1952 Convention on Arrest of Ships seeks to strike an equitable balance between the interests of shipowners and those of claimants. Article 3 (1) of the 1952 Convention provides for the arrest of "sister" ships. A claimant may arrest either the particular ship in respect of which a maritime claim arises, or any other ship owned by the person who is, at the time when the maritime claim arises, the owner of the particular ship. Article 3 (2) of the 1952 Convention provides that ships shall be deemed to be in the same ownership when all the shares therein are owned by the same person or persons.

11. Since 1952, the stratagem of the single-ship company has proliferated. As a result, few ships have "sisters" within the meaning of the 1952 Convention. The only option available to many claimants, therefore, is to arrest the particular ship in respect of which the maritime claim arises. The balance that the 1952 Convention sought to strike has tilted in favour of the shipowner.

12. The Government of the United Kingdom understands that article 3 (2) of the draft convention addresses this problem by implicitly allowing States to specify which ships are in common ownership under national law. We agree with

the CMI that it would be better to make this explicit. Our preference, however, would be to go further. We believe that article 3 (2) should provide explicitly for the arrest of associated ships.

Proposal

13. As currently drafted, the new convention would provide for the arrest both of the particular ship in respect of which the claim arises, and of other ships owned by the person liable for the claim. We wonder, however, whether this approach would provide sufficient flexibility.

14. The use of the concept of ownership might limit the scope of the provision. In the same way that the single-ship company proliferated after 1952, future developments in the shipping industry might reduce the usefulness of the concept of common ownership.

15. We therefore propose that the provision provide explicitly for the arrest of "associated" ships. We propose further that it use the concept of control as the criterion for establishing an association. We believe that this would provide greater scope for national law to keep pace with developments that might otherwise prevent attempts to pierce the corporate veil.

16. The following amendments to article 3 would give effect to these proposals:

(1) [No change.]

(2) Arrest is also permissible of any ship or ships controlled by the person who:

(a) is allegedly liable for the maritime claim; or

(b) controls the company that is allegedly liable for the maritime claim,

and who was, when the claim arose:

(i) the person who controlled the ship in respect of which the maritime claim arose[; or

(ii) the demise charterer, time charterer or voyage charterer of that ship[, or any part of it]].

(3) For the purposes of this article, a person controls a ship if that person owns the ship or controls the company that owns it. The national law of the State in which the arrest is applied for shall determine whether, for these purposes, a person owns a ship or controls a company that owns a ship.

(4) Paragraph (2) shall not apply to claims in respect of ownership or possession of a ship.

(5) Notwithstanding the provisions of paragraph (1), the arrest of a ship which is not controlled by the person allegedly liable for the claim shall be permissible only if, under the law of the State where the arrest is applied for, a judgement in respect of that claim can be enforced against that ship by judicial or forced sale of that ship.

17. The changes of substance are those that we have made to paragraphs (2) and (3). The new paragraph (4) is the tail-piece to the current article 3 (2). The new article 3 (5) is the current article 3 (3), to which we have made some consequential amendments.

18. As under the current wording of article 3 (2), a claimant would not be able to arrest an associated ship which happened to be demise-, voyage- or time-chartered to the person liable for a maritime claim. However, if a person became liable for a maritime claim while chartering a ship, a claimant would be able to arrest any ship which that person controlled (either by owning it or controlling the company that owns it). We do not intend that a demise charterer would be a person having "control" of a ship simply by virtue of being a demise charterer.

19. We have added the words "or any part of it" to the new article 3 (2) (b) to cover slot charterers. We believe that the drafting of article 1 (1), particularly subparagraph (f), is sufficiently wide for claims for which a slot charterer might be liable to fall within the definition of "maritime claim".

Definition of control

20. In the interests of the uniformity of international maritime law, the Diplomatic Conference might wish to provide States with some guidance on how national law might define the concept of "control". Should the Conference decide that this is desirable, we suggest that the guidance should consist of a list of criteria, as in article 13 of the 1989 International Convention on Salvage.

21. The Conference may wish to include such criteria in the convention itself. Alternatively, it may prefer to offer them as a model for national law, perhaps by means of a conference resolution. The Conference may wish to consider the following text as a basis for either of these approaches:

The State in which the arrest is applied for may set criteria in its national law, or provide for a case-by-case examination, for the purpose of determining whether a person owns a ship or controls a company that owns a ship. All relevant factors should be taken into account, including whether the following criteria (without regard to their order) apply in respect of the ships concerned:

(a) Common or similar names;

(b) Common shareholding of the companies owning the ships;

(c) Common management of the shipowning companies;

(d) Common financing arrangements;

(e) Cross-guarantees or other security between the shipowning companies; and

(f) Insurance on a fleet basis.

Evidence

22. Another important issue that national law would need to consider is the burden of proof. For example, national law could place the burden of proof on the claimant, or on the person that the claimant has alleged controls two associated ships. However, there is no need to make this explicit in the convention. The rule contained in article 2 (5) suffices: procedural issues are a matter for national law.

Action requested of the Diplomatic Conference

23. The delegation of the United Kingdom requests that the Diplomatic Conference:

(a) Adopt the amendment to article 3 set out in paragraph 16 above; and

(b) Consider the need for guidance as suggested in paragraph 20 above.